PP

v.

N (A CHILD)

COURT OF APPEAL, KUALA LUMPUR
ALAUDDIN MOHD SHERIFF JCA
ABDUL AZIZ MOHAMAD JCA
NIK HASHIM JCA
[CRIMINAL APPEAL NO: W-09-10-2003]
13 MARCH 2004

CRIMINAL PROCEDURE: *Police investigation - Children - Investigations cannot be completed within 24 hours - Detention - Power of magistrate to order - Whether under ss. 84 or 86 Child Act 2001 - Or whether under s. 117 Criminal Procedure Code - Whether s. 117 Criminal Procedure Code still applicable to children notwithstanding enactment of Child Act 2001 - Whether restriction on 'detention' in s. 83(1) Child Act 2001 covers 'detention pending investigations'*

CRIMINAL PROCEDURE: *Children - Detention and remand - Whether remand under s. 84(2) Child Act 2001 only for purpose of bringing child before children's court - Whether detention under s. 86(1) Child Act 2001 solely for purpose of awaiting trial - Whether can remand or detain for purpose of completing investigations - Period of remand or detention, whether has to be fixed - Applicability of s. 54(2) Interpretation Acts 1948 & 1967 - Applicability of s. 117 Criminal Procedure Code to children*

N, a child within the meaning of the Child Act 2001 ('the Child Act'), was arrested by the police on suspicion of having committed an offence under s. 420 of the Penal Code. As investigations could not be completed within 24 hours, the police produced N before a magistrate and sought an order to remand her for seven days under s. 117 of the Criminal Procedure Code ('the CPC'). The magistrate, realising that N was a child, 'converted' the application to one under s. 84(2) (actually s. 86(1)) of the Child Act and ordered her to be detained for four days. Thereafter, the magistrate entertained some doubts as to the propriety of the course of action she had taken and thus requested the High Court to review the said order. Upon review, the High Court held that s. 83(1) of the Child Act has made it manifestly clear that the arrest and detention of a child shall only be in accordance with the Child Act. It also held that s. 117 of the CPC was inapplicable to a child. Aggrieved, the public prosecutor appealed. The only issue of law that arose for decision before the

justices of appeal herein was whether the detention of a child for the purpose of investigations has to be made under the provisions of the Child Act 2001 or under s. 117 of the CPC.

Held (allowing the appeal and reversing the High Court):
Per Abdul Aziz Mohamad JCA delivering the judgment of the court

[1] Part X of the Child Act (of which there are four chapters, comprising ss. 83 to 104) is wholly concerned with the treatment of a child who is already ready to be charged and tried, that is, after investigations have been completed. Part X itself is entitled 'Criminal Procedure in Court for Children' while chapters one to four are entitled 'Charge, Bail, etc', 'Trials', 'Powers of the Court for Children at the Conclusion of the Trial' and 'Probation' respectively. On the other hand, Part V of the CPC, under which s. 117 is contained, is entitled 'Information to Police and their Powers to Investigate'. (pp 180 e-g, 183 g-h & 184 a-d)

[2] The essence of s. 84 of the Child Act is that a child who is arrested for an offence has to be brought before a Court for Children within 24 hours thereof, whereupon he shall, subject to s. 84(3), be released on a bond. It is only when it is not possible to bring the child before a Court for Children within the said 24 hours that the child may be remanded under s. 84(2) the Child Act. Hence, the remand of a child under s. 84(2) of the Child Act is only for the purpose, and during the pendency, of bringing the child before a Court for Children and not for the purpose of investigations. A child who is arrested and brought directly before a Court for Children cannot be remanded under s. 84(2) of the Child Act. Similarly, the detention of a child under s. 86(1) of the Child Act is only for the purpose of awaiting trial and not for the purpose of investigations. (pp 181 g-h, 182 e, 183 a, g-h & 184 a-d)

[3] Consequently, as ss. 84 and 86 of the Child Act do not provide for the detention of a child for the purpose of investigations, s. 117 of the CPC must and does continue to apply. Section 83(1) of the Child Act cannot, therefore, be taken as having deactivated s. 117 of the CPC with respect to the detention of a child after his arrest for the purpose of investigations. The prohibition "shall not be arrested, detained or tried except in accordance with this Act" embodied in s. 83(1) of the Child Act does not cover 'detention pending investigations'. If Parliament had intended to categorically prohibit a child from being detained for investigations for more than 24 hours, it would have said so precisely. (pp 183 g-h, 184 a-d, 184 e-h, 185 a-c)

Obiter:

[1] It is illogical and incorrect to say that the period for which a child may be remanded under s. 84(2) of the Child Act is to be determined by reference to s. 54(2) of the Interpretation Acts 1948 and 1967. Indeed, the period of remand under s. 84(2) of the Child Act is 'until such time as the child can be brought before the Court for Children'. The period cannot, and therefore need not, be fixed. (pp 183 g-h, 184 a-d & 185 d-h)

*[**Bahasa Malaysia** Translation Of Headnotes]*

N, seorang kanak-kanak mengikut tafsiran Akta Kanak-Kanak 2001 ('Akta Kanak-Kanak') telah ditangkap oleh polis atas syak bahawa beliau melakukan kesalahan di bawah s. 420 Kanun Keseksaan. Oleh kerana penyiasatan tidak dapat disiapkan dalam masa 24 jam, polis telah membawa N ke hadapan majistret dan memohon perintah reman selama tujuh hari terhadapnya di bawah s. 117 Kanun Acara Jenayah ('KAJ'). Majistret, yang menyedari bahawa N adalah seorang kanak-kanak, 'menukar' permohonan kepada satu permohonan di bawah s. 84(2) (sebenarnya s. 86(1)) Akta Kanak-Kanak dan memerintahkan supaya N ditahan selama empat hari. Kemudian daripada itu, majistret merasa sangsi akan kesahan tindakannya dan oleh itu memohon kepada Mahkamah Tinggi supaya perintahnya itu dikaji semula. Pada kajian semula, Mahkamah Tinggi memutuskan bahawa s. 83(1) Akta Kanak-Kanak menyatakan dengan amat jelas bahawa penangkapan dan penahanan seorang kanak-kanak hanya boleh dibuat di bawah peruntukan Akta Kanak-Kanak. Mahkamah juga berpendapat bahawa s. 117 KAJ adalah tidak terpakai kepada kanak-kanak. Terkilan, pendakwa raya merayu. Isu tunggal undang-undang yang berbangkit untuk keputusan hakim-hakim rayuan di sini adalah sama ada penahanan seorang kanak-kanak bagi tujuan penyiasatan harus dibuat di bawah peruntukan Akta Kanak-Kanak 2001 ataupun s. 117 KAJ.

Diputuskan (membenarkan rayuan dan mengakas keputusan Mahkamah Tinggi):

Oleh Abdul Aziz Mohamad HMR menyampaikan keputusan mahkamah

[1] Bahagian X Akta Kanak-Kanak (di mana terdapat empat bab dan mengandungi ss. 83 hingga 104) adalah berkaitan khusus dengan layanan terhadap seorang kanak-kanak yang sudah bersedia untuk didakwa dan dibicarakan, yakni, selepas penyiasatan sudah selesai. Bahagian X itu sendiri bertajuk 'Prosedur Jenayah Untuk Kanak-Kanak di Mahkamah' sementara bab-bab pertama hingga keempat diberi tajuk 'Pertuduhan, Jaminan, dll', 'Perbicaraan', 'Kuasa Mahkamah ke Atas Kanak-Kanak Pada Penutup Perbicaraan' dan 'Percubaan' masing-masingnya. Sebaliknya, Bahagian V KAJ, yang mengandungi s. 117, bertajuk 'Maklumat Kepada Polis dan Kuasa Polis Untuk Menyiasat'.

[2] Intipati s. 84 Akta Kanak-Kanak adalah bahawa seseorang kanak-kanak yang ditangkap kerana melakukan kesalahan harus dibawa ke hadapan Mahkamah untuk Kanak-Kanak dalam tempoh 24 jam di mana kanak-kanak itu boleh ditahan di bawah s. 84(2) Akta Kanak-Kanak. Oleh itu, penahanan seorang kanak-kanak di bawah s. 84(2) Akta Kanak-Kanak hanyalah untuk tujuan, dan sementara menunggu, pembawaan kanak-kanak tersebut ke Mahkamah untuk Kanak-Kanak dan bukan untuk tujuan penyiasatan. Seorang kanak-kanak yang ditangkap dan dibawa secara terus ke Mahkamah untuk Kanak-Kanak tidak boleh ditahan di bawah s. 84(2) Akta Kanak-Kanak. Begitu juga, penahanan seorang kanak-kanak di bawah s. 86(1) Akta Kanak-Kanak adalah semata-mata untuk tujuan penungguan perbicaraan dan bukannya untuk tujuan penyiasatan.

[3] Dengan demikian, oleh kerana ss. 84 dan 86 Akta Kanak-Kanak tidak membuat sebarang peruntukan mengenai penahanan seorang kanak-kanak bagi tujuan penyiasatan, s. 117 KAJ harus dan semestinya terus terpakai. Ianya mengikut bahawa s. 83(1) Akta Kanak-Kanak tidak boleh diambil sebagai telah menyingkir s. 117 KAJ berhubung penahanan seorang kanak-kanak selepas penangkapannya untuk tujuan penyiasatan. Tegahan "tidak boleh ditangkap, ditahan atau dibicarakan kecuali menurut Akta ini' seperti yang tertera dalam s. 83(1) Akta Kanak-Kanak tidak merangkumi 'penahanan sementara menunggu penyiasatan'. Jika Parlimen berniat secara mutlak untuk menegah seseorang kanak-kanak dari ditahan untuk tujuan penyiasatan untuk tempoh yang melebihi 24 jam, ia tentunya akan menyatakan demikian dengan jelas.

Obiter:

[1] Adalah tidak logik dan silap untuk mengatakan bahawa tempoh dalam mana seseorang kanak-kanak itu boleh ditahan di bawah s. 84(2) Akta Kanak-Kanak harus ditentukan melalui rujukan kepada s. 54(2) Akta-Akta Pentafsiran 1948 & 1967. Malah, tempoh tahanan di bawah s. 84(2) Akta Kanak-Kanak adalah 'sehingga satu masa di mana kanak-kanak itu boleh dibawa ke hadapan Mahkamah untuk Kanak-Kanak'. Tempoh tersebut dengan itu tidak boleh, dan tidak perlu, ditetapkan.

Legislation referred to:
Child Act 2001, ss. 83(1), 84(2), (3)(c), 86(1), (2)
Criminal Procedure Code, s. 117(1), (2)
Interpretation Acts 1948 and 1967, s. 54(2)

For the appellant - Ahmad Fairuz Zainol Abidin DPP

[Editor's note: the judgment of the High Court delivered by Augustine Paul J was also reported in the CLJ vide Re N (A Child) [2003] 3 CLJ 126.]

Reported by Gan Peng Chiang

JUDGMENT

Abdul Aziz Mohamad JCA:

The question to be decided in the appeal before us, which was the Public Prosecutor's, was whether the detention of a child for purposes of investigations should be under the Child Act 2001 or under s. 117 of the Criminal Procedure Code (CPC). The Public Prosecutor maintained that it should be under s. 117 of the CPC, which provides as follows in sub-s. (1) and the first sentence of sub-s. (2):

> (1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 28 and there are grounds for believing that the accusation or information is well founded the police officer making the investigation shall immediately transmit to a Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time produce the accused before the Magistrate.
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> (2) The Magistrate before whom an accused person is produced under this section may, whether he has or has not jurisdiction to try the case, from time to time authorize the detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding fifteen days in the whole ...

The section falls under Part V of the CPC, entitled "Information to Police and their Powers to Investigate". At the time a detention is authorized under that section, the case is still at the investigation stage. The detention is to enable investigations to be completed. The person detained is not yet ready to be charged, and no charge would have been drawn up or preferred.

The provisions of the Child Act 2001 that were resorted to or cited in this case are ss. 83(1), 84 and 86. Those sections appear in Part X of the Act, entitled "Criminal Procedure in Court For Children". Part X consists of four chapters: Chapter 1 (Charge, Bail, etc.); Chapter 2 (Trials); Chapter 3 (Powers of the Court For Children at the Conclusion of the Trial); Chapter 4 (Probation). The titles of Part X and of its four chapters indicate that Part X is concerned with the treatment of a child who is ready to be charged and tried. The three sections are to be found in Chapter 1.

Section 83(1) provides as follows:

> Notwithstanding anything contained in any written law relating to the arrest, detention and trial of persons committing any offence but subject to subsections (3) and (4), a child who is alleged to have committed an offence shall not be arrested, detained or tried except in accordance with this Act.

It may be, mentioned, in connection with the arrest, detention and trial of a child having to be "in accordance with this Act", that the Act provides nowhere else but in Part X for matters concerning the arrest of a child for committing an offence, for his detention following arrest and for his eventual trial.

Section 84 provides as follows:

(1) If a child is arrested with or without a warrant, the child shall be brought before a Court For Children within twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Court For Children.

(2) If it is not possible to bring a child before a Court For Children within the time specified in subsection (1), the child shall be brought before a Magistrate who may direct that the child be remanded in a place of detention until such time as the child can be brought before the Court For Children.

(3) The Court For Children before whom a child is brought shall inquire into the case and unless:

(a) the charge is one of murder or other grave crime;

(b) it is necessary in the best interests of the child arrested to remove him from association with any undesirable person; or

(c) the Court For Children has reason to believe that the release of the child would defeat the ends of justice,

the Court For Children shall release the child on a bond, with or without sureties, for such amount as will, in the opinion of the Court For Children, secure the attendance of that child upon the hearing of the charge, being executed by his parent of guardian or other responsible person.

(4) Nothing in this section shall be deemed to affect the powers of a police officer to release the child arrested on bail in accordance with the Criminal Procedure Code.

A Court For Children is a court constituted under s. 11, which, according to sub-s. (2), "shall consist of a magistrate who, in the exercise of his functions as a Court For Children except when making an order under sub-s. 39(4), 42(4), 84(3) or 86(1), as the case may require, shall be assisted by two advisers ..."

The essence of s. 84 is that when a child is arrested for an offence he is to be brought within twenty-four hours before a Court For Children, whereupon he is to be released on a bond pending "the hearing of the charge" unless para. (a), (b) or (c) of sub-s. (3) applies, in which case he is not to be released on a bond. That implies that he has to be detained, but the detention has to be detention pending "the hearing of the charge" also and not for purposes of investigation. The detention (or remand, to be precise) under sub-s. (2) is only detention until the child is brought before the Court For Children, and not for purposes of investigation, and the detention is directed by a magistrate who is not a magistrate of a Court For Children. When a child is brought upon arrest directly to a Court For Children, there can be no question of a detention under sub-s. (2).

Omitting sub-s. (3), s. 86 provides as follows:

> (1) If a child having been arrested and while awaiting trial before a Court For Children is not released under section 84, the Court For Children before whom the child is brought shall cause him to be detained in a place of detention provided under this Act until he can be brought before the Court having jurisdiction unless the Court For Children certifies that:
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> (a) it is impracticable to do so;
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> (b) he is of so unruly or depraved a character that he cannot be safely so detained; or
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> (c) by reason of his state of health or of his mental or bodily condition it is inadvisable so to detain him.
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> (2) Under the circumstances referred to in paragraph (1)(a), (b) or (d), the Court For Children shall have the power to order the child to be detained:
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> (a) in a police station, police cell or police lock-up, separate or apart from adult offenders; or
>
> (b) in a mental hospital,
>
> as the case may require.

It complements s. 84 and deals with the case of a child who cannot be released under s. 84(3) on a bond pending trial and who must, by necessary implication, be detained. It expressly provides for his detention pending trial and is concerned primarily with specifying the place of detention in such cases.

The child in this case was suspected of using the name and identity card number of the complainant to subscribe for Celcom cellular phone services. The complainant took her to a police post, where she was arrested. That was on 13 April 2003. Because investigations could not be completed within twenty-four hours, on 14 April the police brought the child to the magistrate of a Court For Children with a written application under s. 117 of the CPC for her detention for seven days pending investigation. The copy in the record of appeal of the written application, which was typewritten, showed that someone had changed in manuscript the reference to s. 117 in the heading to a reference to s. 86(1) of the Act. The magistrate made an order that the child be detained for four days on account of s. 84(3)(c).

On the same day, 14 April, the magistrate wrote to the High Court applying for a revision of her order, saying in the first paragraph of her letter "saya mendapati terdapat beberapa perintah yang telah silap diberikan" and, in the second paragraph, that the application that had been before her was one under s. 84 of the Act.

An error had certainly been made. As has been stated, the detention under s. 86 is detention on the ground that, pending trial, a child cannot be released on a bond under s. 84 and not because investigation cannot be completed within twenty-four hours. Section 84, as has been stated, is primarily concerned to ensure that, pending trial, a child is released on a bond. In para. 3 of her letter to the High Court, the magistrate, relying on para. (c) of s. 84(3), said that she had reason to believe that the release of the child would defeat the ends of justice. But there was no basis for such belief. The written application of the police did not so claim, and that was because it was not an application for the denial of release on a bond under s. 84 but an application for detention pending investigation. Moreover, if a child deserved to be denied release under s. 84(3), and therefore deserved to be detained under s. 86, the detention cannot be limited to a number of days but must be until the charge is fully heard.

The learned judge of the High Court heard the magistrate's application for revision on 15 April. The child was not represented and did not submit. The DPP submitted that the magistrate had converted the application to one under s. 86(1) and made an order under s. 84(3)(c), but the application should have been allowed to remain as one under s. 117 of the CPC and the order should have been one under s. 117. The judge ruled that the magistrate's order was correct in law.

When the appeal came before us on 27 January 2004, the learned DPP informed us that the child had been released after the four days without any charge being preferred against her and that no further proceedings were contemplated against her. He, however, still wished to proceed with the appeal in order to obtain a ruling as to the applicability of s. 117 to a child, which ruling, whichever way it might go, would have no effect on the child in this case. We accordingly dispensed with further attendance of the child, who was unrepresented and who would have had nothing to contribute in the appeal. We agreed to hear the appeal and we heard the DPP's submissions on 29 January.

In his grounds of judgment the learned judge said that the magistrate converted the application to one under s. 84(2), which, as has been seen, was not the case. The core of the judge's grounds for holding that the magistrate's action was correct in law was in these words:

> The issue for deliberation is whether the arrest and detention of a child must be under section 117 as contended by the learned Deputy Public Prosecutor or under the Act as understood by the learned Magistrate. The answer, to my mind, lies in section 83(1) of the Act which reads as follows". (There then followed the words of section 83(1)). "This section makes it manifestly patent that the arrest and detention of a child shall be in accordance with the Act thereby rendering section 117 inapplicable as expressly provided. Unlike section 117, section 84(2) of the Act which deals with the detention of a child does not prescribe any time period for detention.

There then followed a discussion of the period, about which we shall have something to say later.

The judge obviously considered that the magistrate made her order, and correctly, under s. 84(2). That was not correct because, as already stated, she made the order under s. 84(3)(c), or rather under s. 86(1) by reason of para. (c) of s. 84(3). Nowhere in his grounds did the judge mention s. 84(3)(c) or 86(1). In any case, as already stated, detention under s. 84(2) is not for purposes of investigation. It is a remand by reason that it is not possible within twenty-four hours to bring a child to a Court For Children to be dealt with on the charge against him. It could only happen – and very rarely too, we imagine, if it does happen – where the arrest occurs at a place from which it is not possible to travel to a Court For Children within twenty-four hours. That being the purpose of the remand, s. 84(2) itself provides that the remand is "until such time as the child can be brought before the Court For Children". There is no need to fix a time limit. It must be understood that the child must be brought before a Court For Children without unnecessary delay. Moreover, in this case there was no question of an order being made under s. 84(2) because the child was brought directly to a Court For Children and the magistrate who dealt with the police application was the magistrate of that court.

What we thought was really of concern to the Public Prosecutor was the judge's ruling that, by virtue of s. 83(1), s. 117 was inapplicable to a child. And that was because if that ruling was correct a child could not be detained pending investigation where investigation cannot be completed within twenty-four hours. Such detention is only available under s. 117. There is no provision in the Act for such detention in the case of a child. As has been seen, detention under or by virtue of s. 84 or 86 is not detention pending investigation.

The effect of s. 83(1) is to prohibit the arrest, detention or trial of a child except in accordance with the Act. The prohibition applies notwithstanding anything contained in any written law. While imposing the prohibition, the section itself does not provide for the arrest, detention or trial of a child. If the word "detention" were to be understood in a liberal and broad sense, then detention for purposes of investigation would fall within the section and its effect would be to prohibit the detention of a child under s. 117 for purposes of investigation while there is no power to detain him for such purposes under the Act.

The DPP, however, argued that since s. 83(1) belongs to a Part of the Act, Part X, that deals with "Criminal Procedure in Court For Children" and not with the investigation of offences alleged to be committed by a child, and since the detention provided for in that Part is detention of a child pending trial or punitive detention after trial, the word "detention" in s. 83(1) should be

construed as not being intended to include detention pending investigation. Not having the benefit of contrary argument, and being unable to conceive of any contrary argument that could successfully be raised, we were in agreement with the DPP. We did ask ourselves the question why the scope of the word "detention" should be curtailed by the mere fact of its being positioned in a Part of the Act that provides for detention for the purposes that we have mentioned and not for purposes of investigation, but we were overwhelmed by the consideration that if Parliament had intended to prohibit the detention of a child beyond twenty-four hours for the reason that investigation cannot be completed, it would have done so expressly and would not have relied on the use of the word "detention" in s. 83(1) being construed as intending to include detention for purposes of investigation, to achieve or bring about such prohibition.

Agreeing with the DPP, we allowed the appeal and ruled that s. 117 of the CPC is applicable to a child.

One other thing needs to be mentioned. We have said that the wording and operation of s. 84(2) are such that it does not require a direction of remand made under it to specify the period of remand. The judge, observing that the section, unlike s. 117, does not prescribe the period of remand and obviously thinking that a direction of remand under s. 84(2) has to specify the period of remand, said that s. 54(2) of the Interpretation Acts 1948 and 1967 governs the determination of the period. Subsection (2) says:

> Where no time is prescribed within which anything shall be done, that thing shall be done with all convenient speed and as often as the prescribed occasion arises.

The provision is applicable in a situation where one is required to do something but the time within which it has to be done is not prescribed. It answers the question how much time is allowed to one within which to accomplish the thing that is to be done. And the answer is that the thing to be done must be accomplished "with all convenient speed". It is not an appropriate provision to assist a detaining authority to decide for how long he may order a person to be detained, because the answer furnished by the provision, that he may detain the person or that the person may be detained "with all convenient speed", is simply not a logical answer and will not assist him. It might be an appropriate answer to the question – which he does not and need not ask – how much time he is allowed within which to make the detention order, but it certainly does not answer the question for how long he may order the person to be detained.